THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.7892 OF 2005

Disposed of on 08-09-2005.

Between:

M/s.Sujatha Constructions ….. Petitioner

and

Chief General Manager, Telecom and others… respondents

THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.7892 OF 2005

ORDER:

1. The petitioner is a partnership firm and it is represented by its Managing Partner K.Jagan Mohan Rao. The petitioner firm was provisionally declared as A-Class contractor by respondents 1 and 2 (The Chief General Manager, Telecom, BSNL, Hyderabad and The Deputy General Manager (Plg.), Hyderabad) vide letter dated 19.11.2003 for a period of five years. The petitioner firm secured several works at various places of Andhra Pradesh, Maharashtra and Karnataka for laying cable construction works for BSNL for the year 2004-05. The petitioner firm had carried out several underground cable construction works for BSNL, A.P. Circle for the last ten years. Respondents 1 and 2 issued a show cause notice dated 24.1.2005 to the petitioner firm alleging that the petitioner firm has violated clauses 9.2(g), 9.2 (e) and 10.3 of Instructions for Enlistment of Contractors (for short Instructions). The petitioner firm submitted show cause notice and thereafter the respondents proceeded to pass orders on 29.3.2005 blacklisting the petitioner firm for a period of five years. The order of blacklisting has been challenged by the petitioner-firm in the writ petition. The challenge is made on the ground that the impugned order is opposed to all corners of law and also in violation of the principles of natural justice. It is also alleged that the order impugned in the writ petition has been placed on mere assumptions and presumptions and the decision to blacklist the petitioner firm has been taken by the respondents before issuance of show cause notice and the issuance of show cause notice thereafter is only a rituality. It is trite to refer para (7) of the affidavit filed in support of the writ petition and it is thus:

> " 7. It is respectfully submitted that the petitioner firm is involved in carrying, under ground cable laying construction works of the respondents for last ten year and obtained several certificates for its outstanding works in cable laying more over, the petitioner firm has received the contract works from respondent No.3 for the year 2004-05 also for laying of pole less and UG cable tender works for Medak Division and Siddipet Division and the works are under progress. If the petitioner really committed any irregularity for the works carried earlier, the subsequent contract for the same District would not have been offered to the petitioner firm in the year

2004-2005. Further, even issuance of the impugned notice is in violation of Clause 9.3 of the Procedure for Enlistment of Contractor. Under which, the contract approving authority the respondent No.3 herein shall submit a report justifying blacklisting to the enlisting authority the respondent No.1 herein and upon receipt of such report the enlisting authority shall refer the case to a committee for submitting its recommendation, up on such recommendations of the committee, the enlisting authority will cause a show cause notice to the contractor, if contractor does not reply, the enlisting authority is free to take decision based upon the committee's recommendation. In the instant case, the respondents 1 and 2 without any report from the respondent No.3 on their own, without constituting a committee issued the show cause notice and thereafter inspite of receipt of reply, passed the impugned order and blacklisted the petitioner firm for a period of five years arbitrarily by misusing the power conferred under the statute."

2. The respondents filed counter affidavit. The sum and substance of the counter affidavit is : After the enlistment of the petitioner firm and after certain works were entrusted to it, it came to light that the petitioner firm was under investigation by CBI and crimes were registered in RC.06(A)/04-Hyd and RC.07(A)/04-Hyd before the Court of Special Judge for CBI Cases, Hyderabad and both the matters are pending adjudication. In both the cases deponent to the writ affidavit is arrayed as an accused and he has been charged under the provisions of Corruption Act, 1988 r/w Sec.120B and 420 IPC. A show cause notice was issued to the petitioner firm basing on the report of the Vigilance Department of BSNL on the ground that the petitioner-firm is involved in unethical practice as well as furnishing misleading information at the time of enlisting insofar as M/s.Lakshmi Constructions. M/s. Laxmi Constructions had applied for the enlistment in the year 2003 and the deponent to the affidavit was also the managing Partner of the said firm. Since both the firms i.e. the petitioner and M/s Lakshmi Constructions were represented by the deponent to the affidavit as Managing Partner, the deponent was informed that M/s.Lakshmi Constructions' application for enlistment cannot be considered and the deponent has in fact taken back the application of M/s.Lakshmi Constructions. Under the enlistment guidelines of which the petitioner is well aware, two firms with the same Managing Partner cannot be given registration and only one firm is entitled for such registration. In view of the same the petitioner took back the application of M/s.Lakshmi Constructions. However, another application was made in the year 2004 by M/s.Lakshmi Constructions, this time showing Sri.V.Manmada Rao as

Managing Partner of the firm. This reconstitution of the partnership firm of M/s.Lakshmi Constructions is not registered with the Registrar of firm and the necessary declaration in the proforma are not submitted. M/s Lakshmi Constructions had enclosed the very same experience certificates (turnover certificates) which were submitted earlier showing the deponent to the affidavit as Managing Partner. Though, M/s Lakshmi Constructions was not enlisted, the deponent has tried to mislead the respondent for the purpose of obtaining registration for M/s.Lakshmi Constructions. The petitioner firm was issued the show cause notice after following due procedure contemplated in clause 9(3) of Instructions. A committee was constituted, which after studying the report of DGM, Vigilance, BSNL submitted its recommendations basing on which a show cause notice was issued to the petitioner by the Enlisting Authority. A reply submitted to the petitioner firm to the show cause notice was taken into consideration. The enlisting authority being not satisfied with the explanation passed the impugned proceedings blacklisting the petitioner firm for a period of five years i.e. upto 26.3.2010.

3. A reply affidavit has been filed by the Managing Partner of the petitioner-firm. It is stated in the reply affidavit that mere accusation against the petitioner-firm in the charge sheet by CBI before the Special Judge for CBI Cases, Hyderabad cannot be a ground to blacklisting the petitioner-firm. Paras 13 and 14 of the reply affidavit is to be noted and they are as follows:

> " 13. Further on a reading of the material papers enclosed to the counter affidavit, it is clear that complaint to the CBI was given by the 1st respondent and the same was based upon a report submitted by the Vigilance officer for the period 25.7.2001 to 27.7.2001. No action was taken and on the contrary the petitioner-firm enlistment was accepted. Even on a reading of the committee's report which is filed as material paper it is clear that the committee mechanically directed to take action without there being any proper application of mind.
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> 14. Since blacklisting would result in serious consequences, the authorities cannot take action only on mere allegations. It is further submitted that even now the petitioner firm has got as many as 7 works which are in the process of execution which fact is admitted by the respondents and if the order of blacklisting is not set aside, the existing works would be

> rescinded in which case it will result in consequences of crippling the petitioner firm. As per the contract guidelines for the works carried in the year 2000-2001, if any action has to be taken for any violation it should be taken within a period of 6 months from the date of completion of works. The petitioner completed the works in the year 2001 itself and amounts were also released and no action was taken within the stipulated time under the contract. On this ground also the impugned order is liable to be set aside."

4. Heard the learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

5. Learned counsel appearing for petitioner submits that blacklisting of the petitioner-firm was in violation of principles of natural justice. He further submits that blacklisting of order involves civil consequences and it creates barriers between the persons blacklisted and the department concerned in the matter of transactions. It is also contended by him that the decision to blacklisting the petitioner-firm was taken even before the issuance of the show cause notice and therefore the order impugned in the writ petition is in violation of principles of natural justice. In elaborating his arguments he submits that Sujata, DGM was a party to the committee which took decision to blacklist the petitioner-firm before issuing show cause notice and therefore the order impugned in the writ petition based on issuance of show cause notice subsequently is opposed to the principles of natural justice. Reliance has been placed on the decision of our High Court in SRI.S.S.CONSTRUCTIONS PVT. LTD. V. ENGG.IN.CHIEF, I & CAD DEPARTMENT, HYDERABAD. In the case cited the petitioner firm filed a complaint against the Chief Engineer. The Government having examined the matter found that the allegations leveled by the petitioner-firm therein were not proved and directed the Department to initiate departmental action against the petitioner-firm including black-listing in view of the blackmailing and arm-twisting tactics adopted by it. The concerned Chief Engineer against whom the complaint was filed attended the meeting of the Board of the Chief Engineers where it was resolved and decided for cancellation of the name of the firm from the approved list of Contractors and to debar the firm from tendering in all categories. Further, he wrote to the Engineer-in-Chief to issue necessary order to cancel the registration of petitioner firm. The facts in the cited case and the facts of the case on hand are distinctive and therefore the proposition of law laid down in the

cited case is not applicable to the case on hand.

6. Learned Standing Counsel appearing for the respondents submits that the respondents issued orders blacklisting the petitioner-firm in accordance with the procedure prescribed under the instructions. He further submits that before issuing show cause notice a committee examined the allegations leveled against the petitioner and recommended to initiate action for imposing punishment for violation of clauses 9.2(g), 9.2 (e) and 10.3 of Instructions for Enlistment of Contractors. A further submission has been made that non public servants can be tried in the same trial punishable under the P.C. Act. Reliance has been placed on the decision of Supreme Court in P.NALLAMMAL V. STATE.

7. It is not in dispute that the petitioner firm was provisionally declared as A1 class contractor by respondents 1 and 2 for a period of five years as contractor for cable construction works in BSNL. A show cause notice came to be issued to the petitioner firm by 2nd respondent to the petitioner firm calling upon it as to why action deemed fit should not be imposed under clauses 9.2(g), 9.2 (e) and 10.3 of Instructions for Enlistment of Contractors. The allegations made in the show cause notice is that the petitioner-firm has been found involved in unethical business practice and that it had given false information at the time of enlisting. At this juncture, clauses 9.2(g), 9.2 (e) and 10.3 of Instructions for Enlistment of Contractors need to be noted:

> " 9.2(g). If the contractor has been found involved in unethical business practice.
>
> 9.2(e). If the contractor is found to have given false information at the time of enlistment or is declared or is in the process of being declared bankrupt/insolvent winding up, dissolved or partitioned.
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> 10.3. The enlisted contractors shall not enter into any fresh partnership without the prior approval of the BSNL. In case, they wish to enter into fresh partnership, they must intimate in advance full details of the intending partnership along with the draft of the partnership deed. Any departure in this regard will render the contractors liable to be removed from the approved list of

contractors.”

8. Procedure to remove/blacklist the contractor has been detailed in clause 9.3 of Instructions. If the contract approving authority observed that any of the conditions justified removal/ blacklisting of the contractor from enlisting such authority shall immediately submit report to the enlisting authority giving details of lapses/violation justifying removal/blacklisting of the contractor. Upon shift of the contract preventing authority, the enlisting authority shall refer the case to the committee for submitting its recommendations. Upon receipt of recommendations of the committee to the said contractor giving him/her at least two weeks time to reply. Upon receipt of reply the enlisting authority shall decide about removal/blacklisting of the contractor. If the contract does not reply to the registered notice then the enlisting authority is free to take the after expiry of notice period. The decision about blacklisting shall expressly mention duration for which the contractor is blacklisted/ debar and also from applying fresh enlisting in the BSNL for during the period of blacklisting.

9. It is no more in dispute that the Managing Partner of the petitioner-firm is one of the accused in the charge sheet before the Special Judge for CBI Cases, Hyderabad. The accusation made against the petitioner firm is that it withdrew the money for the work, which was not actually carried out as per the contract. The persons who ordered payment to the petitioner firm were arrayed as A1 to A3 in the said charge sheet. The Special Judge for Trial of CBI Cases, Hyderabad took the charge sheet on trial and the case is pending trial. In the given facts and circumstances of the case the issue that falls for consideration is whether the petitioner firm can be said to have been found involved in the unethical business practices. It is contended by learned counsel for the petitioner that mere accusation is not sufficient to record a definite finding with regard to involvement of the petitioner-firm in unethical business practices. I am unable to accede to the submission made by the counsel for the petitioner for the

reason that CBI made a thorough investigation and found the petitioner firm withdrew certain amounts for the works without execution of the same. In the circumstances of the case, the allegation made in the show cause notice that he is involved in unethical business practice is well founded.

10. It is contended by learned counsel appearing for the petitioner that the petitioner has not furnished any false information at the time of enlisting and therefore invocation of clause 9(2)(e) of Instructions is unwarranted. The allegations made against the petitioner found in the show cause notice is that K.Jagan Mohan Rao as Managing Partner of M/s.Lakshmi Constructions and M/s.Sujata Constructions has applied for firms enlisting of contractors for the year 2003-04 and as per clause 10(2) of the Instructions the application of M/s Lakshmi Constructions and M/s.Rajesh Constructions were rejected and the application for M/s Sujata Constructions was only considered for enlisting. Subsequently V.Manmadha Rao applied for enlisting as contractor in the same name of M/s.Lakshmi Constructions for the year 2004-05. The fact that K.Jagan Mohan Rao who is the Managing Partner of the petitioner-firm is also one of the partners of M/s.Lakshmi Constructions has been suppressed and thereby the Managing Partner of M/s.Sujata Constructions has been indulged in giving false information at the time of enlisting. The conduct of the Managing Partner of M/s Sujata Constructions squarely comes under clause 9(2)(e) of Instructions. Therefore, the allegations made I the show cause notice are well founded and the respondents are justified in blacklisting the petitioner-firm. An argument has been advanced by learned counsel appearing for the petitioner-firm that show cause notice came to be issued after taking decision by the higher authorities to blacklisting. The procedure for blacklisting has been laid down in clause 9(2) of the Instructions. As per the procedure the enlisting authority shall refer the case to the committee for submitting its recommendations. The committee comprising of AGM, CORDN-II, DGM(S) and DGM (F&A) considered the allegations and recommended for blacklisting the petitioner-firm after following the necessary formalities on the subject. It is clear from the committee report that blacklisting of the petitioner firm should be in accordance with the procedure. The procedure contemplates issuance of show cause notice which has been duly complied in this case. Therefore, I do not see any merit in the contention of the learned counsel for the petitioner that issuance of show cause notice is a rituality.

11. It is nextly contended by learned counsel for the petitioner that blacklisting the petitioner-firm would seriously effect the various works the firm has been handling.

The works that are being attended to by the petitioner firm have been detailed in para 3 of the writ affidavit and they are :

i. Award of Poleless and UG Cable Tender Works for the year 2004-2005 in Siddipet Division dt.11.10.2004;

ii. Award of Poleless and UG Cable works for th eyear 2004-2005 in Medak Division dt.11.10.2004;

iii. Award of Cable Construction and Rehabilitation works of Section-I (in Warangal Telecom Dist for the year 2004-2005) dt.29.12.2004;

iv. Award of Cable Laying Works for the year 2004-2005 in Khammam District, Sattupalli Division;

v. Award of Cable laying works for the year 2004-2005 in Krishna District in Vuyyuru, Chellapalli and Machilipatnam Divisions.

vi. Under Ground Cable laying works for the year 2004-2005 in Bangalore City, State of Karnataka;

vii. Under Ground Cable Laying Works for 2004-2005 in Pune City, State of Maharashtra."

The factual aspect of handling the above said works by the petitioner firm was not denied by the respondents in their counter affidavit. Indeed the entrustment of the above said works to the petitioner-firm has been admitted in para 3 of the counter affidavit and it is thus:

" 3. I submit that the averments in paragraphs 2, 3 and 4 of the affidavit under reply are substantially true and correct. It is submitted that the petitioner was entrusted the works as per the enlistment guidelines in November, 2003. The petitioner who had applied for the enlistment as per the "Instructions for enlistment of contractors in cable laying guidelines volumes Procedure for Enlistment of Contractors" is aware of the terms and conditions of such enlistment."

12. The effect of blacklisting is stated in para 9(4) of Instructions and it is thus:

" 9.4 Period for removal/blacklisting:

a. Removal: The contractor who has been removed from the enlistment shall neither be allowed to participate in the tenders anywhere in DTS nor shall be allowed to apply for enlistment for a period of 10 years from the date of issue of orders.

b. Black-listing:

The contractor who has been blacklisted shall neither be allowed to participate in the tenders anywhere in DTS nor shall be allowed to apply for enlistment for a minimum period of 2 years and maximum period of five years from the date of issue of orders.

The action of removal/blacklisting will impact the economic interest of the contractor and therefore it is likely that the contractor may seek recourse to legal action, it is therefore incumbent on the part of competent authority to ensure that proper and adequate ground exists for such decision. However, for proper and timely execution of works, the terms and conditions should be observed meticulously and appropriate and timely action should be initiated against the contractor(s) if delays, lapses or violations are observed without waiting for their repetitions. Timely execution of works with requisite quality at competitive costs is the essence of the contract system."

It is clear from the above-referred clause that blacklisting has only a prospective effect and it has no effect on the works already entrusted to the contractor. Therefore, I find that the apprehension of the petitioner firm that blacklisting the petitioner firm would effect the works already entrusted to it has no merit.

13. In the result, I find that the writ petition is devoid of merits and the same is accordingly dismissed. No costs.

Dated: 08-09-2005. (B.Seshasayana Reddy, J)

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THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.7892 OF 2005

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